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CHARLES ELMORE C

No. 19, Original

In the Supreme Court of the United States

OCTOBER TERM, 1932

EX PARTE: THE UNITED STATES, PETITIONER

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AT THE ARGUMENT

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BRIEF FOR THE UNITED STATES AT THE ARGUMENT

OPINION BELOW

The opinion of the District Court, upon which the issuance of a bench warrant was denied, is set out as Exhibit B (pp. 16–25) to the petition for a writ of mandamus. It is reported in 55 F. (2d) 960.

JURISDICTION

The motion for leave to file the petition for writ of mandamus was submitted on May 16, 1932. The petition for writ of mandamus was filed May 23, 1932, and a rule to show cause was issued returnable October 3, 1932. The return to the rule to show cause was submitted October 3, 1932. The jurisdiction of this Court is invoked under Sections 234 and 262 of the Judicial Code (U. S. C., Title 28, Secs. 342, 377). *Ex parte United States,* 242 U. S. 27, 39–40.

QUESTION PRESENTED

Whether a District Judge may in his discretion refuse to issue a bench warrant for the arrest of a defendant named in an indictment, duly returned by a grand jury, which charges the defendant with having committed an offense within the jurisdiction of the court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property to be taken for public use, without just compensation.

STATEMENT

The petition for a writ of mandamus was filed, by leave of Court, on May 23, 1932. The facts stated in the petition may be summarized as follows:

On March 10, 1932, the grand jury in the Eastern District of Pennsylvania presented an indictment against one Joseph V. Wingert, charging him in four counts with certain violations of the banking laws of the United States. On March 22, 1932, the United States Attorney for the Eastern District of Pennsylvania presented to the court a written petition praying that a bench warrant issue for the arrest of Wingert. On consideration of this motion, the respondent, on March 22, 1932, denied the petition and declined to issue the bench warrant for the arrest of Wingert.

Copies of the indictment, of the petition of the United States Attorney for the bench warrant, and the order of the respondent denying the motion for a bench warrant are set forth as Exhibit A to the petition (pp. 7–15).

On October 3, 1932, the respondent's return to the rule to show cause was submitted. In this return all the allegations of fact in the petition for mandamus are admitted, but it is asserted that the action of the respondent was within his judicial discretion and not subject to control by mandamus.

SUMMARY OF ARGUMENT

I. When an indictment has been returned, fair on its face and charging an offense within the jurisdiction of the court, the issuance of a bench warrant does not depend upon the exercise of judicial discretion. In considering the power and duty of a court to issue a warrant it is important to distinguish between three distinct situations: (1) A warrant of arrest may be sought from a magistrate prior to indictment upon the complaint of any person, either officer or citizen. Most of the cases cited in the brief of counsel for the respondent relate to this situation and are obviously not pertinent here. (2) A warrant may be sought for the purpose of removing a person charged with crime from one district to another. In such a case the magistrate normally is called upon to determine whether there is probable cause for the issuance of the warrant, and his determination is accordingly not subject to review. (3) A warrant of arrest may be sought to bring the accused into court after an indictment has been found against him. This is the situation involved in this case. The duty to issue a bench warrant in such a case has long been recognized without question in our law. That this duty is one which may not be denied in the guise of discretion is plainly indicated by several decisions of this Court.

II. The Fifth Amendment contemplates the issuance of a bench warrant after an indictment has been found. The Fourth Amendment forbids

the issuance of a warrant unless there is "probable cause." But the Fourth Amendment must be read together with the Fifth Amendment, and when an indictment has been found which is fair and valid on its face the Fifth Amendment contemplates that the person accused "shall be held to answer" for the crime charged.

III. The lack of a preliminary hearing is not a sufficient reason for refusing to issue a bench warrant. Although the respondent seems to rely on the fact that the indictment was found in this case without a preliminary hearing, his counsel concedes that such a hearing is not necessary. The correctness of this concession is established by many authorities. The lack of a preliminary hearing, therefore, affords no basis for the respondent's refusal to issue a bench warrant.

ARGUMENT

I

WHEN AN INDICTMENT HAS BEEN RETURNED, FAIR ON ITS FACE AND CHARGING AN OFFENSE WITHIN THE JURISDICTION OF THE COURT, THE ISSUANCE OF A BENCH WARRANT DOES NOT DEPEND UPON THE EXERCISE OF JUDICIAL DISCRETION

The respondent has admitted in his return that the grand jury in the Eastern District of Pennsylvania has returned an indictment against Joseph V. Wingert, and that that indictment charges Wingert with violations of the banking laws of the United States. No contention is made that the indictment is in any way irregular, or that

it does not adequately charge the offenses named. We submit that under such circumstances the issuance of a bench warrant does not involve the exercise of judicial discretion and that the refusal of the respondent to issue a bench warrant may be corrected by mandamus.

In considering the power and duty of a court to issue a warrant it is important to distinguish between three distinct situations. The failure of the respondent's counsel to make this distinction in his brief has, we believe, resulted in some confusion, and the citation of cases which are not pertinent in the present controversy.

1. A warrant of arrest may be sought from a magistrate prior to indictment upon the complaint of any person, either officer or citizen. In such a case it is plainly the magistrate's duty to determine whether the facts presented to him constitute probable cause for the issuance of a warrant. Such a determination involves the exercise of judicial discretion, and the magistrate is, of course, not subject to mandamus when he is acting in the legitimate exercise of this discretion. Many of the cases relied upon in the briefs of respondent's counsel[1]

[1] *State ex rel. Romano* v. *Yakey*, 43 Wash. 15; *People* v. *McGuire*, 151 App. Div. 413; *De Graff* v. *State*, 2 Okla. Crim. 519; *United States* v. *Ocampo*, 18 Philippine 1, 42; *Re Broom*, 18 Can. Cr. Cas. 254; *Rex* v. *Bros.*, 85 Law Times Rep. 581; *Rex* v. *Kennedy*, 86 Law Times Rep. 753.

Of these cases, *People* v. *McGuire*, *De Graff* v. *State*, and *Re Broom* in fact involved the question of the issuance of a warrant for the arrest of a person charged with an offense in an information. This question is, of course, closely related

relate to this situation and are obviously not pertinent here.

2. A warrant may be sought for the purpose of removing a person charged with crime from one district to another.[2] Here again the question before the magistrate is one of probable cause. Various issues may be presented to the magistrate, such as the identity of the accused and whether he has ever been within the district where the charge is made, as well as the adequacy of the facts disclosed to show that an offense has been committed. Where these questions are in issue before the magistrate, he must exercise his discretion, and his discretion is not subject to review. For this reason cases such as *Benson* v. *Henkel,* 198 U. S. 1, and *Price* v. *Henkel,* 216 U. S. 488, relied on by the respondent's counsel, are plainly distinguishable. A similar question was involved in *United States* v. *Judge Lawrence,* 3 Dallas 42. In that case the district

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to that raised when a warrant is sought on a mere complaint, since the information is the charge of the district attorney alone, or in some jurisdictions, of a private citizen. The cases cited in the footnote at the bottom of pages 7 and 8 of the brief of respondent's counsel involve the same question and are likewise not in point here.

[2] Strictly there are two steps in a removal proceeding, the warrant of arrest bringing the accused person before the magistrate, and the warrant of removal directing the transfer of the accused to the district where the offense was committed. We know of no case concerning the issuance of a warrant for arrest in a removal proceeding; in such cases the question has apparently arisen only on the warrant of removal.

judge refused to order the removal of an accused person for trial in another jurisdiction on the ground that (p. 53) "the evidence was not sufficient to authorize his issuing a warrant * * *." The question before the district judge was thus plainly one involving the exercise of his judicial discretion, and this Court consequently refused to issue a writ of mandamus to compel the issuance of a warrant.

When there is no dispute as to the identity of the accused in a removal proceeding, and the charge against him is shown by a certified copy of an indictment, the situation becomes closely analogous to that involved here. In such a case, if the indictment be fair upon its face, this Court has held that the magistrate has no discretion but must order the removal of the defendant. *Fetters* v. *United States ex rel. Cunningham,* 283 U. S. 638.

3. A warrant of arrest may be sought to bring the accused into court after an indictment has been found against him. This is the situation involved in this case. None of the cases cited by the respondent's counsel relates to this question, and we know of none which directly decide it. See *In re Davis,* 107 N. J. Eq. 160, 175, 178; *State* v. *Gordon,* 18 La. Ann. 528; *Shaw* v. *Commonwealth,* 1 Duval 1 (Ky.). The lack of authority on this question, we believe, is due to the fact that warrants have always been issued in such a case as a matter of course, and no district judge has ever before de-

clined to issue a bench warrant upon the filing of an indictment, or made further inquiry before issuing it.

The duty to issue a bench warrant in such a case has long been recognized without question in our law. Thus, in 1 Chitty, *Criminal Law,* 339–340, the author states that—

> it appears to be *the established practice,* upon an indictment found for a misdemeanor during the assizes or sessions, to issue a bench warrant signed by a judge or justices of the peace, or two of the latter, to apprehend the defendant; and when the assizes and sessions are over, the clerk of the assize and clerk of the peace respectively will, on the application of the prosecutor, grant a certificate of the indictment having been found, upon which any judge of the King's Bench or justice of the peace of the proper county *will grant* a warrant for apprehending the defendant, * * *. (Italics ours.)

Similarly, in 1 Archbold, *Criminal Procedure,* 103, the practice is stated as follows:

> Upon an indictment being found at the assizes or quarter sessions, if the defendant be not in custody, or if out on bail, and it be doubtful whether he will surrender to take his trial, the court upon application, *will grant a bench warrant,* upon which he may be apprehended as upon any other warrant, as mentioned; * * *. (Italics ours.)

See also 2 Hale, *Pleas of the Crown,* 198–199.

There is nothing to indicate that this rule and practice has been changed in any way in more modern times. The same rule is stated in Section 195 of the American Law Institute's Code of Criminal Procedure (Official Draft, 1930), which provides as follows:

> SECTION 195. *Warrant to be issued on indictment or information.*—When an indictment has been found or an information filed against a person charging him with the commission of an offense, if he is not in custody or at large on bail for the offense charged, the court or a judge thereof *shall,* subject to the provisions of section 196 [section 196 relates to the issuance of a summons in the case of a misdemeanor], direct the clerk to issue either immediately or when so directed by the prosecuting attorney a warrant of arrest to secure the presence of such person to answer the indictment or information. The warrant may be reissued from time to time by order either of the court, judge or prosecuting attorney. (Italics ours.)

The commentaries to this provision in the Code of Criminal Procedure cite and quote the State statutory provisions now in effect on this question. In many of the States the issuance of a bench warrant after the finding of an indictment is regarded as so far ministerial that it is issued by the clerk without any order by the court and in some instances by the district attorney. See, *e. g.,* N. Y. Code of Criminal Procedure, Sec. 300. ("A bench warrant * * * may also be issued by the district attorney at any

time after the indictment is found.") In nearly all of the States where such statutes are in force constitutional provisions similar to the Fourth Amendment are also in effect.[3] This is a persuasive practical construction of the constitutional provision which has never been questioned.

That the duty of the district court to issue a bench warrant is one which may not be denied in the guise of discretion, is plainly indicated by several decisions of this Court. Thus, in *United States* v. *Thompson*, 251 U. S. 407, 412–413, this Court held that the "absolute right of the United States to prosecute" can not be thwarted "by the application of unauthorized judicial discretion."[4] In *Ex parte United States*, 242 U. S. 27, 42, this Court held that the judicial power did not embrace "a discretionary authority to permanently refuse to try a criminal charge." These words describe the present situation exactly. Unless the accused comes into court voluntarily (which is not at all

[3] References to the constitutions and statutes of these States are given in the Appendix, *infra*, pp. 17–18.

[4] Similarly, it is held in numerous State decisions that the court may not on its own motion order the dismissal of an indictment. *People* v. *Zobel*, 54 Colo. 284; *State* v. *Morrison*, 165 Ind. 461; *Commonwealth* v. *Cundiff*, 149 Ky. 37; *Commonwealth* v. *Hughes*, 153 Ky. 34; *Slater* v. *Commonwealth*, 239 Ky. 620, 624; *Commonwealth* v. *Andrews*, 2 Mass. 409, 414; *Commonwealth* v. *Hart*, 149 Mass. 7; *State* v. *Mathews*, 98 Mo. 125, 129; *State* v. *Hickling*, 45 N. J. L. 152; *People* v. *Bennett*, 49 N. Y. 137, 141; *People* v. *Harris*, 1 Edmonds Select Cases (N. Y.) 453, 464; *People* v. *Beckwith*, 2 N. Y. Crim. Rep. 29; *Commonwealth* v. *Reed*, 65 Pa. Super. Ct. 91, 94; *State* v. *McLane*, 31 Texas 260; *State* v. *Anderson*, 119 Texas 110.

probable), the court's refusal to issue a bench warrant amounts to a permanent refusal to try the criminal charge. In the language of this Court in *United States* v. *Thompson*, 251 U. S. 407, 415—

> the assertion of the judicial discretion which was the basis of the judgment below is incompatible with the spirit and purpose underlying the admitted principles as to the power of grand juries, and the right of the Government to initiate prosecutions for crime, since in the case stated such powers are controlled, not by a rule of law, but depend upon a mere exercise of judicial discretion.

The act of issuing a bench warrant to apprehend a defendant named in an indictment is purely ministerial. The warrant is the original process by which the defendant is brought before the court for arraignment upon the indictment, upon which no proceedings may be had until the defendant is arraigned. The act of issuing process determines nothing, and is no more judicial than the issuance of a summons in a civil suit or a subpœna for the attendance of a witness. Given an indictment fair upon its face, and duly returned by the grand jury, the issuance of the warrant is but a ministerial step in the process by which the validity of the indictment and the guilt or innocence of the defendant may be judicially determined. The refusal of process was in effect a refusal to proceed at all.

II

THE FIFTH AMENDMENT CONTEMPLATES THE ISSUANCE OF A BENCH WARRANT AFTER AN INDICTMENT HAS BEEN FOUND

Counsel for the respondent quotes the Fourth Amendment (*supra*, p. 2) in his brief (p. 6) and apparently relies upon that part of the Amendment which provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." He argues from this that the issuance of a warrant in any case requires the determination of "probable cause" and that this determination necessarily involves an exercise of judicial discretion. In the Supplemental Brief for the respondent this ground is apparently relied on as the sole basis for the decision below.

But the Fourth Amendment and the Fifth Amendment are *in pari materia* (*Boyd* v. *United States*, 116 U. S. 616, 633), and must be read and construed together. The Fifth Amendment's provision that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *" plainly contemplates that when "a presentment or indictment of a Grand Jury" has been returned, the accused "shall be held to answer." When the two amendments are thus read together it becomes apparent that the Fourth Amendment relates to warrants sought before a committing magistrate when no indictment has been returned. In such a case the Fourth Amendment forbids the

issuance of a warrant unless there is "probable cause." But where an indictment has been found which is fair and valid on its face, the Fifth Amendment contemplates that the person accused "shall be held to answer" for the crime charged.

From this it follows that the question presented to the respondent in this case did not involve any determination of probable cause. When the indictment was returned by the grand jury it was the respondent's duty to issue a bench warrant. This duty involved the exercise of no discretion, and the failure to issue the warrant may be corrected by mandamus.

III

THE LACK OF A PRELIMINARY HEARING IS NOT A SUFFICIENT REASON FOR REFUSING TO ISSUE A BENCH WARRANT

It is difficult to tell from the opinion of the respondent upon just what grounds his decision was based. Apparently he refused to issue a bench warrant because the indictment involved in the present case had been returned by the grand jury without a preliminary hearing of the accused before a committing magistrate. Thus, in his opinion, the respondent stated (Pet. p. 21) that—

> The instant case has been chosen merely because it was a case in which no preliminary inquiry has been made, but in which there was no special reason one should not be made.

And in the brief of the respondent's counsel (p. 11) it is stated that—

> the situation would not have arisen had the accused been brought before a United States Commissioner in the first instance.

But if this was the basis of the respondent's decision, he has already admitted its inadequacy. In the very brief in which the statement just quoted above is printed, the following statement is made (p. 7):

> The United States says that no preliminary hearing is necessary (brief, p. 6). This is unquestionable law.

In this final statement counsel for the respondent is undoubtedly correct; but we have been unable to reconcile the inconsistency between this statement and the one previously quoted from the same brief.

That a preliminary examination prior to the return of an indictment is not required or necessary is established by many authorities.[5] The Consti-

[5] The cases so holding are unanimous and include at least two cases in the Eastern District of Pennsylvania. *United States* v. *Reilly*, 30 F. (2d) 866 (E. D. Pa.); *United States* v. *Averett*, 26 F. (2d) 676 (W. D. Va.); *Van Dam* v. *United States*, 23 F. (2d) 235 (C. C. A. 6th); *Roth* v. *United States*, 294 Fed. 475 (C. C. A. 6th); *United States* v. *Kerr*, 159 Fed. 185 (E. D. Pa.); *United States* v. *Fuers*, Fed. Cas. No. 15174 (W. D. Pa.). See *Goldsby* v. *United States*, 160 U. S. 70, 73; *United States* v. *Kilpatrick*, 16 Fed. 765, 770–771 (W. D. N. C.). Compare *United States* v. *Jenks*, 258 Fed. 763 (E. D. Pa.).

tution does not require any preliminary hearing. Fifth Amendment (*supra*, p. 2); see *Hughes* v. *Gault*, 271 U. S. 142, 149. The finding of an indictment without a sworn charge previously made is legal, and "it is settled that such a charge is unnecessary." *Ruthenberg* v. *United States*, 245 U. S. 480, 482–483; *Hale* v. *Henkel*, 201 U. S. 43, 59–60. The practice of requiring a preliminary examination of a criminal complaint was the English practice, and it has been adopted in some of the States of the Union, for example, Pennsylvania and North Carolina. See *Hale* v. *Henkel*, *supra*, at pp. 64–65. But the English practice is not followed by nor binding upon the United States courts. *United States* v. *Thompson*, 251 U. S. 407; *Hale* v. *Henkel*, *supra*; *United States* v. *Kerr*, 159 Fed. 185 (E. D. Pa.).

CONCLUSION

The writ of mandamus should issue as prayed.

Respectfully submitted.

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NOVEMBER, 1932.

APPENDIX

The constitutions of the following States contain provisions forbidding the issuance of warrants except upon "probable cause" in language the same as, or substantially similar to, the Fourth Amendment. In these States there are also statutes in effect which direct the court or the clerk to issue a warrant upon the return of an indictment without further inquiry.

Alabama. *Constitution:* Art. I, Sec. 5. *Statute:* Code, 1928, Sec. 3278 ("A writ of arrest must be issued by the clerk").

Arkansas. *Constitution:* Art. II, Sec. 15. *Statute:* Digest of Statutes, 1921, Sec. 3041 ("the court shall forthwith make an order").

Colorado. *Constitution:* Art. II, Sec. 7. *Statute:* Comp. Laws, 1921, Sec. 7082 ("It shall be the duty of the clerks" to issue process on indictments).

Florida. *Constitution:* Declaration of Rights, Sec. 22. *Statute:* General Laws, 1927, Sec. 8375 ("a capias shall issue").

Illinois. *Constitution:* Art. II, Sec. 6. *Statute:* Rev. Stat., 1929, c. 38, Sec. 747 (the clerk "shall immediately issue process").

Indiana. *Constitution:* Art. 1, Sec. 11. *Statute:* Burns Stat., 1926, Sec. 2153 ("the clerk shall issue a warrant").

Iowa. *Constitution:* Art. I, Sec. 7. *Statute:* Code, 1927, Sec. 13760 ("the judge of the court shall make an order").

Kansas. *Constitution:* Bill of Rights, Sec. 15. *Statute:* Rev. Stat., 1923, Sec. 62–1101 ("the clerk must issue a warrant").

Kentucky. *Constitution:* Bill of Rights, Sec. 10. *Statute:* Car. Codes, 1927, Crim. Prac., Sec. 141 ("the court shall forthwith make an order").

Louisiana. *Constitution:* Art. I, Sec. 7. *Statute:* Code of Criminal Procedure, 1929, Art. 55 ("the presiding judge shall cause a warrant to issue").

Mississippi. *Constitution:* Art. 3, Sec. 23. *Statute:* Code, 1930, Sec. 1218 (process "shall be issued").

Missouri. *Constitution:* Art. II, Sec. 11. *Statute:* Rev. Stat. 1919, Sec. 3910 (the clerk "must issue warrants upon all indictments").

Montana. *Constitution:* Art. III, Sec. 7. *Statute:* Rev. Codes, 1921, Sec. 11839 ("a warrant must issue").

Oregon. *Constitution:* Art. I, Sec. 9. *Statute:* Code, 1930, Sec. 13–813 ("the court must order the clerk to issue a bench warrant").

Tennessee. *Constitution:* Art. I, Sec. 7 (*semble*). *Statute:* Code, 1932, Sec. 11609 (capias "shall be issued by the clerk").

Texas. *Constitution:* Art. I, Sec. 9. *Statute:* Rev. Stat. 1925, Crim. Proc., Art. 443 ("A capias shall be immediately issued by the district clerk upon each indictment").

Virginia. *Constitution:* Art. I, Sec. 10 (*semble*). *Statute:* Code, 1930, Sec. 4881 (the court "shall award process").

West Virginia. *Constitution:* Art. III, Sec. 6. *Statute:* Code, 1932, Sec. 6177 ("the court shall award process").

Wisconsin. *Constitution:* Art. I, Sec. 11. *Statute:* Wis. Stat. 1931, Sec. 355.02 ("process shall forthwith be issued").

U. S. GOVERNMENT PRINTING OFFICE: 1933